

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NEW ENGLAND CARPENTERS HEALTH
BENEFITS FUND, PIRELLI ARMSTRONG
RETIREE MEDICAL BENEFITS TRUST;
TEAMSTERS HEALTH & WELFARE FUND
OF PHILADELPHIA AND VICINITY;
PHILADELPHIA FEDERATION OF
TEACHERS HEALTH AND WELFARE
FUND; DISTRICT COUNCIL 37, AFSCME -
HEALTH & SECURITY PLAN; JUNE
SWAN; BERNARD GORTER, SHELLY
CAMPBELL and CONSTANCE JORDAN

Plaintiffs,

v.

FIRST DATABANK, INC., a Missouri
corporation; and McKESSON
CORPORATION, a Delaware corporation,

Defendants.

C.A. No. 1:05-CV-11148-PBS

**PLAINTIFFS' UNOPPOSED MOTION FOR LEAVE TO FILE A SURREPLY
RE: MCKESSON'S MOTION FOR A PROTECTIVE ORDER**

Plaintiffs seek leave to file the attached surreply in response to McKesson's proposed reply memorandum in support of its motion for a protective order to bar Plaintiffs from obtaining transactional data that would allow them to demonstrate a correlation between AWP and U&C prices. McKesson falsely claims that Plaintiffs "concede" that their request for transactional data falls outside the scope of the Court's Order authorizing limited discovery pertaining to the correlation between the U&C and the AWP. McKesson is not only in error, but its position is disingenuous, given that its own pricing service, Auto-Rx-Net, correlates U&C prices to third-party AWP-based reimbursement rates. Further, McKesson misses the point regarding Plaintiffs' discussion of its RelayHealth subsidiary and Auto-Rx program. McKesson occupies a

unique position in the pharmacy industry that allows it to follow price trends and draw correlations between U&C and AWP. And while McKesson has consistently taken the position in this litigation that there is no correlation between U&C prices and AWP, Auto-Rx demonstrates how McKesson profited by exploiting this precise correlation. The requested transactional data would allow Plaintiffs to examine for themselves the effect of AWP on U&C prices *vis à vis* third-party reimbursement. Plaintiffs ask leave of Court to file the attached surreply brief to address these issues.

Dated: February 22, 2008

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CERTIFICATE PURSUANT TO LOCAL RULE 7.1

Pursuant to Local Rule 7.1(A)(2), the undersigned certifies that counsel for Plaintiffs have conferred with counsel for McKesson who advises that McKesson does not object to Plaintiffs' motion for leave to file a surreply provided that Plaintiffs withdraw their objection to McKesson's motion for leave to file a reply brief and that Plaintiffs limit their proposed surreply to two pages. Plaintiffs herewith advise the Court that they withdraw their objections to McKesson's motion.

/s/ Steve W. Berman
Steve W. Berman

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on February 22, 2008.

/s/ Steve W. Berman

Steve W. Berman

Exhibit A

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HEALTH & SECURITY PLAN; JUNE)
SWAN; BERNARD GORTER, SHELLY)
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CORPORATION, a Delaware corporation,)

Defendants.)

C.A. No. 1:05-CV-11148-PBS

**PLAINTIFFS' SURREPLY IN RESPONSE TO MCKESSON'S PROPOSED REPLY IN
SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER**

McKesson falsely claims that Plaintiffs “concede” that they are seeking data regarding drugs purchased by insured consumers. Plaintiffs make no such concession. The information sought demonstrates the relationship between AWP and U&C prices and therefore falls within the discovery authorized by the Court’s scheduling order. McKesson’s position is furthermore disingenuous as its own pricing service, Auto-Rx-Net, directs pharmacies to set their U&C prices in accordance with AWP-based third-party reimbursement rates.

Further, McKesson misses the point regarding Plaintiffs’ discussion of its RelayHealth subsidiary and Auto-Rx program. McKesson does not, nor can it deny that through its subsidiary

RelayHealth (processing claims from “90% of US pharmacies”) it is uniquely placed in the industry to follow price trends and to draw correlations between U&C and AWP. In direct contrast to McKesson’s own representations to the Court that there is no correlation between the U&C and AWP, Auto-Rx demonstrates how McKesson has profited from RelayHealth’s transactional information by selling a program to set U&C prices based on AWP by means of third-party reimbursement rates.

McKesson’s attempt to disassociate its U&C pricing program from AWP falls on its face, as McKesson is forced to concede that regardless of whether the 101% feature is utilized, the Auto-Rx program raises U&C prices above the average AWP-based third-party reimbursement, demonstrating a direct correlation between those price figures. Reply at 4. And while the Auto-Rx program may only have been introduced in 2005 and may have only reached a small “niche” market, that is not to say that the underlying premise of the product (setting U&C prices above AWP-based third-party reimbursement rates so as to maximize third-party reimbursement) is not in wide use throughout the market or that other variations of this principle were not in play in the 2001-2005 period.

Contrary to McKesson’s representation, Plaintiffs’ request for transactional data from third-party pharmacies to track and analyze the changes to their third-party reimbursement prices relative to their U&C prices is distinct from and not already encompassed by Plaintiffs’ other U&C discovery requests. The requested data will allow Plaintiffs to examine the effect of the AWP on U&C pricing *vis à vis* third-party reimbursement. This request reasonably falls within the Court’s order authorizing limited, additional discovery to uncover the correlation between AWP and the U&C.

Dated: February 22, 2008

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/s/ Steve W. Berman

Steve W. Berman